

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

No. CV-04-5128-AAM

VS.

**CERTIFICATION TO
WASHINGTON STATE
SUPREME COURT**

LINDA HOFFMAN, in her official capacity a Director of the Washington Department of Ecology, et al.,

Defendants.

PURSUANT TO the Federal Court Local Law Certificate Procedure Act, RCW 2.60.010-.900, and Washington Rule of Appellate Procedure ("RAP") 16.16, Alan A. McDonald, Senior United States District Judge for the Eastern District of Washington, hereby certifies:

PARTIES

Plaintiff United States is represented by Cynthia J. Morris, Esq., Michael A. Zevenbergen, Esq., Kenneth C. Amaditz, Esq., and David Kaplan, Esq., United States Department of Justice, Environmental Defense Section, P.O. Box 23986, Washington, D.C. 20026-3986.

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1 Intervenor-Plaintiff Fluor Hanford, Inc., is represented by Stephen B. Cherry, Senior
2 Counsel, Legal Services, Esq., P.O. Box 1000, Richland, WA 99352-1000, and James R.
3 Spaanstra, Esq., Jessica F. Toll, Esq., and Lynn M. Kornfeld, Esq., Faegre & Benson, 3200 Wells
4 Fargo Center, 1700 Lincoln Center, Denver, CO 80203-4532.

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6 Intervenor-Plaintiff Tri-City Industrial Development Council is represented by Stephen A.
7 Smith, Esq., and Matthew J. Segal, Esq., Preston, Gates & Ellis, LLP, 925 Fourth Avenue, Suite
8 2900, Seattle, WA 98104.

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10 The State of Washington Defendants are represented by Joseph E. Shorin III, Esq., Elliott
11 S. Furst, Esq., Laura J. Watson, Esq., Andrew A. Fitz, Esq., Assistant Attorneys General, Office
12 of the Attorney General, Ecology Division, P.O. Box 40117, Olympia, WA 98504-0117.

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14 Intervenor-Defendants Yes on I-297: Protect Washington, et al., are represented by
15 Michael J. Robinson-Dorn, Esq., University of Washington School of Law, Environmental Law
16 Clinic, William H. Gates Hall, Box 353020, Seattle, WA 98195-3020.

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18 **QUESTION OF WASHINGTON LAW**

19 Plaintiff United States and Intervenor-Plaintiffs assert Washington's Cleanup Priority Act
20 (CPA), enacted into law by voter passage of Initiative 297 (I-297) in November 2004, violates the
21 United States Constitution in several different respects. This court believes the CPA is
22 susceptible of an interpretation that would avoid or substantially modify the federal constitutional
23 challenge. Because of its very recent enactment, the CPA has not been subject to any
24 interpretation by the courts of the State of Washington. Accordingly, it is respectfully requested
25 that the Washington Supreme Court consider and answer the following questions:

26 1. What materials are encompassed within the definition of "mixed waste" set forth in

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1 Section 3(9) of the CPA?

2 (a) Specifically, does the definition of “mixed waste” encompass materials that consist
3 solely of radioactive source, special nuclear, or byproduct materials and, if so, under what
4 circumstances does the CPA apply to such materials?

5 (b) Specifically, does the definition of “mixed waste” encompass materials that are
6 mixtures of radioactive source, special nuclear, or byproduct materials and other hazardous
7 substances that do not designate as “dangerous waste” under state laws? If so, under what
8 circumstances does the CPA apply to such materials?

9 (c) Specifically, does the definition of “mixed waste” encompass materials that are not
10 “solid wastes” under the Resource Conservation and Recovery Act (RCRA) and, if so, under what
11 circumstances does the CPA apply to such materials?

12 (d) In light of the Court’s answers to subparts (a) through (c), above, does the definition of
13 “mixed waste” expand the scope of materials regulated as mixed waste under the Washington
14 Hazardous Waste Management Act (HWMA) and RCRA?

15
16 2. Does the operation of the CPA prevent the intra-site transfer of waste among various
17 units at a site or facility?

18
19 3. How does the exemption in Section 8 of the CPA affect the application of the CPA to
20 United States naval facilities?

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22 4. Does Section 6(1)(a)(ii) of the CPA, which requires development of an inventory of
23 hazardous substances potentially disposed to unlined trenches based on “actual characterization of
24 such substances, require the physical inspection of each and every material disposed?

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26 5. If the federal court finds that certain provisions of the CPA are unconstitutional, are the
27 remaining provisions of the statute severable?

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2 If the Washington Supreme Court decides to consider these certified questions, it may in
3 its discretion reformulate the questions. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075,
4 1076 (9th Cir. 1999).

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6 **RECORD**

7 Attached hereto is a certified copy of Ct. Rec. 1 (Complaint of United States), 35 (Answer
8 of State Defendants), 53 (Summary Judgment Brief of United States), 62 (Intervenor Complaint
9 of Fluor Hanford), 73 (Intervenor Complaint of TRIDEC), 109 (Answer of State to Intervenor
10 Complaint of Fluor Hanford) and 110 (Answer of State to Intervenor Complaint of TRIDEC),
11 filed in the captioned matter. This constitutes the "record" pursuant to RCW 2.60.010(4). **This**
12 **"record" contains all matters in the pending cause material for consideration of the**
13 **question certified for answer.**

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15 **BRIEFS**

16 If the Washington State Supreme Court accepts certification, the State of Washington
17 Defendants shall file the first brief in the Washington Supreme Court. RAP 16.16(e)(1). The
18 Intervenor-Defendants may also elect to file a brief at the same time as the State files its brief.

19
20 **The State shall notify this court when the Washington Supreme Court accepts or**
21 **declines certification. If the Washington Supreme Court accepts certification, the State**
22 **shall be responsible for providing a status report to this court within 90 days regarding the**
23 **status of the matter in the Washington Supreme Court.**

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1 **IT IS SO ORDERED.** The District Court Executive shall enter this certification, forward
2 a certified copy thereof and a certified copy of the designated record to the Washington Supreme
3 Court, and forward copies of this certification to counsel.

4 **DATED** this 8th of February, 2005.

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6 s/ Alan A. McDonald
7 ALAN A. McDONALD
8 Senior United States District Judge
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